Supreme Court, U.S.
FILED
FEB 22 2000
CLERK

(4)

No. 99-1069

IN THE

Supreme Court of the United States

THE MONTGOMERY COUNTY PUBLIC SCHOOLS AND MEMBERS OF THE MONTGOMERY COUNTY BOARD OF EDUCATION,

Petitioners,

v.

JEFFREY EISENBERG AND ELINOR MERBERG, ON BEHALF OF JACOB EISENBERG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION

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CONSTITUTION:

U.S. Const. amend. XIV, § 1 9

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REPLY IN SUPPORT OF PETITION

Respondents begin the Brief in Opposition ("Opp.") by conceding that the decision below will prompt school districts throughout the Nation to re-examine their race-conscious student assignment policies. Respondents draw the right conclusion concerning the practical effect of the decision below but, by arguing that the Petition should be denied to give school districts an incentive "to devise lawful policies" to achieve the goal of racial diversity in public schools, Opp. at 1, they propose the wrong response from this Court. Because the decision below so sweepingly rejects the voluntary efforts of school districts to avoid racial segregation, if it is allowed to stand school districts within

the Fourth Circuit will have to change race-sensitive student assignment policies and school districts elsewhere will be chilled in their efforts to provide the benefits of racial diversity in assignments for their students. The decision below is having this potent effect although it is based on a rule of law that conflicts with decisions of this Court and of other courts of appeals. This confusion will be relieved not by *denial of* the Petition, but only by plenary consideration of this case by this Court.

1. Ever since the decision in *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), local school officials have struggled with whether they may take race-conscious actions necessary to avoid creating racially isolated schools. While this Court's cases hold that race-conscious actions by governmental actors are not unlawful *per se*, and state that school officials may take voluntary, race-conscious actions in making student assignments, the Fourth Circuit has now, like the Fifth Circuit in *Hopwood*, devised a bright-line rule, holding below that "racial balancing" is always unconstitutional. App. 19a. In the Fourth Circuit, application of the rule against racial balancing requires no evidentiary record because the particulars of any race-conscious student assignment plan do not matter. As long as race may be outcome-determinative for a single child and the school district is involved in what may be characterized as racial balancing, the Fourth Circuit held in the decision below that the policy cannot stand.

Respondents assert that the Fourth Circuit issued a narrow decision holding the use of "racial bars" unconstitutional. Opp. at 1. The Fourth Circuit's opinion, however, nowhere mentions racial bars; its rule is that "racial balancing" is unconstitutional. App. at 19a.[1] Semantics aside,

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[1] Characterizing the MCPS transfer policy as one that imposes "racial bars" is misleading. While a student's race is outcome-determinative in some cases, there is no racial bar that prevents all students of a particular race from transferring into or out of any MCPS school. The transfer policy's personal hardship exception

neither the respondents' "racial bar" rule nor the Fourth Circuit's "racial balancing" rule are supported by this Court's cases, which eschew *per se* rules and require a case-by-case analysis of race-conscious governmental action, using strict scrutiny.

Respondents rely heavily on Justice Powell's opinion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), and no doubt couch the decision below in terms of a "racial bar" to make this case sound more like the plurality opinion in *Bakke*. But Justice Powell's opinion in *Bakke* does not impose a *per se* rule against "racial bars" in student admissions policies.[2] In *Bakke*, Justice Powell stated that "when a State's distribution of benefits . . . hinges on . . . the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest." 438 U.S. at 320. As most recently refined, strict scrutiny analysis is what this Court has called for in such cases.

Strict scrutiny "evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race . . . is legitimate, *before permitting unequal treatment based on race* to proceed." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200,

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allowed five white students to transfer out of Glen Haven, Jacob Eisenberg's neighborhood school, in 1998-99. App. 7a & n.10. Indeed, respondents were offered a transfer from Glen Haven, to a foreign language program, that they declined. Pet. at 9.

[2] Nor do any of the decisions relied on by respondents refer to "racial bars" or hold that any particular use of race is *per se* unconstitutional. Respondents' argument that a line of cases from *Bakke* to *Wessmann* v. *Gittens*, 160 F.3d 790 (1st Cir. 1998), forbids "racial bars" is simply wrong. Respondents recognize that *Wessmann* itself, based on a full trial record, paid "'particularized attention' to the facts supporting the need for diversity." Opp. at 6 (quoting *Wessmann*, 160 F.3d at 798). The Fourth Circuit's rule against racial balancing foreclosed that process here.

228 (1995) (first emphasis in original, second emphasis added). *Adarand* thus expressly contemplates that some race-conscious programs that burden an individual based on race will survive strict scrutiny.

The decision below jumps to a conclusion of illegality without the careful analysis required by strict scrutiny under *Adarand*. That rush to judgment is betrayed by the Fourth Circuit's lack of a basis in a developed factual record reflecting such fundamental information as the number of students denied transfers under the policy and what racial isolation MCPS would create by abandoning consideration of race in student transfers.[3] The Fourth Circuit bypassed a factual record because the scrutiny it applied was not a principled exercise of "distinguish[ing] legitimate from illegitimate uses of race," *Adarand*, 515 U.S. 228, but rather served as a means of concluding that any use of race is unconstitutional. In the Fourth Circuit, application of strict scrutiny is indeed "fatal in fact," contrary to this Court's assurances in *Adarand*. *Id.* at 237 (citation omitted).

In contrast, the Ninth Circuit and the Second Circuit have approved race-conscious student assignment policies after careful scrutiny on a full factual record. *See* Pet. at 20-22; *Hunter ex rel. Brandt* v. *Regents of Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999), *petition for reh'g pending; Parents Ass'n of Andrew Jackson High Sch.* v. *Ambach*, 738 F.2d 574 (2d Cir. 1984). And in *Wessmann* v. *Gittens*, 160 F.3d 790 (1st Cir. 1998), the First Circuit, unlike the Fourth Circuit, applied its narrow tailoring analysis to a record developed after a full trial. The Fourth Circuit's *per se* approach cannot

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[3] While the record below does not disclose the effect district-wide on removing race as a factor in the MCPS transfer policy (because respondents did not challenge the district-wide policy in the preliminary injunction motion), it does show that at Glen Haven, Jacob Eisenberg's neighborhood school, a total of 19 white children – approximately 14% of that population – would have transferred from Glen Haven for 1998-99 in the absence of a race-conscious policy. App. 7a n.10; J.A. 55.

be reconciled with the careful analysis undertaken by these other courts of appeals.

2. Respondents urge this Court to bypass this case and await "the most important constitutional issue in this area of the law: whether diversity could ever be a compelling interest for equal protection purposes." Opp. at 17-18. Respondents' plea is telling. They urged the courts below to hold as a matter of law that no interest other than a strictly remedial purpose can ever be sufficiently compelling under strict scrutiny to warrant upholding a student assignment plan that considers race. App. 25a. They concede now that this issue is important. Opp. at 17-18. An honest look at the Fourth Circuit's decision here – and other cases decided recently by the lower courts – reveals that rulings rejecting race-sensitive policies on narrow tailoring grounds are achieving the same objectives that respondents urged as a matter of law on the compelling state interest prong of the strict scrutiny test. As a result, a case raising the "compelling state interest" issue may never reach this Court.

The Fourth Circuit avoided the compelling state interest issue by "assuming" that MCPS had a compelling interest. App. 13a. The court then performed its narrow tailoring analysis on a record that was compiled in one week's time to address only a motion for preliminary injunction. The motion did not encompass the operation or effect of the transfer policy district-wide, but only concerned where a single child would begin first grade, yet the Fourth Circuit concluded that no further fact-finding was necessary to support a permanent injunction against district-wide application of the policy. App. 20a. Respondents attempt to defend the Fourth Circuit's result using facts that were not before that court, Opp. at 3 n.3, and to explain away erroneous "facts" found by that court, Opp. at 14 n.12, but they do not even attempt a comprehensive justification of the Fourth Circuit's method of conducting the narrow tailoring analysis.

The decision below is not alone in end-running the compelling state interest prong of the strict scrutiny test and invalidating a policy on the basis of narrow tailoring, almost

without regard to the state of the factual record. In *Tuttle* v. *Arlington County Public Schools*, 195 F.3d 698 (4th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3497 (Jan. 31, 2000) (No. 99-1274), the Fourth Circuit applied its racial balancing rule to strike down a race-conscious student assignment policy that in its particulars was quite different from the MCPS transfer policy. In *Tuttle*, like the decision below, the court assumed the compelling nature of the school district's interest and then made its own factual findings to conduct a narrow tailoring analysis and find the policy unconstitutional. *Id.* at 705-07. In *Tuttle*, no record was compiled in the district court on the issue of narrow tailoring or compelling state interest because the district court consolidated a motion for a preliminary injunction with that for a permanent injunction and refused the school board's request to be allowed to make any evidentiary record. *Id.* at 702.

Since the Petition was filed in this case, a district court, citing the Fourth Circuit's decision below, has followed the same procedure to strike down a race-conscious student assignment policy. In *Scott* v. *Pasadena Unified Sch. Dist.*, No. CV 99-1323 (C.D. Cal. Feb. 8, 2000), the court assumed the compelling nature of the school district's interest in a race-conscious student assignment policy for a magnet school program, but granted summary judgment against the school district on the issue of narrow tailoring. It was immaterial to the district court that the race-conscious element of the admissions policy had never been put into practice by the school district. The court in *Scott*, like the Fourth Circuit below and in *Tuttle*, purported to apply strict scrutiny and to find fault with narrow tailoring. In reality, the decision below is leading the way to the use of *per se* rules in the narrow tailoring analysis in which the particular facts simply do not matter.

3. Permitting this case to stand would lead to inappropriate limits on the local autonomy of public school districts, as respondents suggest when they propose that "[i]ntegration can only be pursued as a result of a constitutional violation, not for its own sake." Opp. at 12. That stunning assertion finds no support in this Court's cases. This Court has stated

repeatedly that school officials may take race into account in devising student assignment policies to increase integration in public schools.[4] Respondents attempt to distinguish *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43 (1971), *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and *Bustop, Inc.* v. *Board of Educ. of City of Los Angeles*, 439 U.S. 1380 (Rehnquist, Circuit Justice 1978), Opp. at 7-8, but never dispute that in each of those cases the Court recognized the inherent authority of school districts to take race-conscious measures in assigning students to public schools. *See* Pet. at 15-19.[5]

Respondents confuse the cases addressing the power of *federal courts* to remedy constitutional violations involving segregated schools, and law concerning the autonomy of *school officials* to exercise their educational judgment in reducing racial isolation and creating diversity in student assignments. In *Freeman* v. *Pitts*, 503 U.S. 467 (1992), this Court addressed the showing that was necessary for a school district to be released from a mandatory federal court desegregation order. *Freeman* does not address the actions that may be taken voluntarily by a school district not under court order to desegregate, where district officials have determined, in their educational judgment, that a race-conscious

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[4] Respondents' assertion that Congress has greater power than do local school boards to decide where children should go to school turns federalism on its head. Opp. at 9-10 n.7. Moreover, while respondents rely on *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), to support the notion that the federal government has greater latitude here than do state and local governments, that notion was put to rest in *Adarand*. 515 U.S. at 227.

[5] Respondents' emphasis of other points made by the Court in *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), fails to obscure the fact that *Seattle* makes no sense unless it is based on the principle that school officials generally have the authority to take race-conscious measures – in that case mandatory busing – in assigning students to schools. This Court in *Seattle* would not have struck down as unconstitutional a state law prohibiting such student assignments if those assignments violated the Fourteenth Amendment.

policy is necessary to avoid the educational harms associated with racially isolated schools. In *Freeman* this Court simply found that the school district "had no *duty* to achieve system-wide racial balance in the student population." 503 U.S. at 496 (emphasis added). To say that a school district has no duty to obtain any set level of integration, however, is not the same as saying that the Constitution forbids a school district from taking steps, even race-conscious ones, to avoid creating racial isolated schools or to provide more diverse student enrollments.

4. The National School Boards Association and sixteen other groups of professional educators from across the Nation have filed an *amicus curiae* brief in support of the Petition ("NSBA Brief") to underscore that it is important to the elected and appointed school officials who make daily decisions about the best way to educate children that the Court address this issue. As the Petition explains and *amici* emphasize, this Court has recognized over and over again the importance of allowing locally elected or appointed school officials autonomy to control the education of the children they serve. NSBA Br. at 10-11. No responsibility of these local officials is more basic than deciding where children will attend school.

Conscientious school officials who seek to comply with the law currently find themselves facing the prospect of litigation no matter what they do regarding the use of race in student assignment. This area is bound to be delicate as school officials balance constitutional duties that "are not always harmonious." *Wygant* v. *Jackson Bd. of Educ.* 476 U.S. 267, 277 (1986). The decision below, however – by adopting bright-line rules instead of applying strict scrutiny as called for by this Court – leaves school officials insufficient room in which to operate without facing a discrimination lawsuit. Respondents recognize this when they dismiss the prospect of litigation against MCPS for creating racially isolated schools as "an issue for a different lawsuit." Opp. at 15 n.14. Here again, respondents agree with MCPS about the likely effect of the decision below, but propose the wrong solution. That MCPS may face litigation by operating its

transfer policy without regard to race is a reason to grant the Petition, not to deny it.[6]

The issues raised by the Petition are important and are spawning litigation all across the country. These cases are being decided using varying interpretations of this Court's precedents under the Equal Protection Clause. Until this Court steps in, the unsettled nature of the law will support the rising tide of litigation against school districts which is diverting resources from the educational needs of our Nation's children. The Petition squarely presents the issues of whether school districts may take voluntary race-conscious actions in student assignments to avoid creating racially isolated schools and whether a court of appeals may make that determination in the absence of a factual record in the district court. This Court should grant the Petition to end the uncertainty so that school districts and lower courts will know the parameters of the law governing voluntary race-conscious admissions policies.

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[6] Respondent further suggests that the decision below poses no problem because MCPS can simply forbid any student transfers. Opp. at 16. This assertion, however, accords too little weight to the educational judgment made by MCPS that providing parents with some measure of school choice improves the education of MCPS students. In addition, as the Petition explains, state and federal law make certain student transfers unavoidable. Pet. at 28.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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